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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of

DARRELL BRYAN

SBH PROPERTIES, INC.

) MM Docket No. 93-241  
)  
)  
)  
)  
)  
)

File No. BPH-920109MA

File No. BPH-920123MD

For Construction Permit for  
New FM Channel 276A  
Tusculum, Tennessee

To: Honorable John M. Frysiak  
Administrative Law Judge

SECOND PETITION TO ENLARGE ISSUES

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February 15, 1994

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## SUMMARY

Bryan improperly relied upon "used" equipment costs in estimating his construction costs, without any supporting documentation reflecting that such equipment is available for his purchase at the prices indicated. In addition, he failed to seriously determine the costs of acquiring a number of equipment items, compelling the conclusion that he has underestimated his costs by over \$ 50,000.00, not including the cost of purchasing new the equipment he proposed to purchase "used" or the debt service and electric service costs he has omitted from his estimate, nor the legal and engineering costs which he anticipated incurring in the prosecution of his application, which costs were included in his total estimate of \$ 175,000.00. Accordingly, a material question of fact exists whether Bryan underestimated his costs and whether Bryan has sufficient funds available to meet his actual costs of constructing and operating the proposed station.

At the time Bryan certified as to the availability committed funds from the Greene County Bank, the documentation which he had on hand to support that certification was insufficient to meet the explicit requirements which the Commission has imposed, and was, likewise, insufficient to afford Bryan with any basis for determining whether he would be in a position to meet the terms and conditions to which the proposed financing was to be made subject. Accordingly, financial qualifications and certification issues are warranted and should be added.

Bryan failed to produce a single document relating to his broadcast experience or the civic activities for which he seeks credit in this proceeding, despite the fact that both the Commission's Standard Document Production procedures and SBH's Initial Supplemental Request required the production of such documents and despite the fact that Bryan acknowledged in his deposition testimony that such documents do in fact exist. In short, Bryan engaged in a flagrant obstruction of discovery and abused of the Commission's procedures in furtherance of such obstruction. An appropriate issue must be added.

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SBH Properties, Inc. ("SBH") by counsel, pursuant to Section 1.229(b)(3) of the Commission's Rules herewith petitions for enlargement of the issues in the above proceeding against Darrell Bryan ("Bryan") to include the following issues: 1/

1. To determine whether Bryan is presently financially qualified.
2. To determine whether Bryan was financially qualified at the time it so certified.
3. To determine whether Bryan's financial certification was false.
4. To determine whether Bryan has obstructed discovery by failing to produce documents which he was required by the Rules to produce or has been ordered to produce.
5. To determine in light of the evidence adduced under the foregoing issues the effect on Bryan's basic qualifications.

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1. This petition is being filed within 15 days of the receipt by undersigned counsel for SBH of a copy of the transcript of the deposition testimony of Darrell Bryan, upon which this Petition is based.

In support whereof the following is shown:

#### BACKGROUND

1. Financial Qualifications. Bryan filed his application on the June, 1989 version of FCC Form 301. In response to Section III., Item 1 of the Application, Bryan certified that he was financially qualified to construct and operate the proposed station for three months without revenue. (See: Exhibit A, hereto) In response to Section III., Item 2 of the Application, Bryan certified that his total estimated costs "necessary to construct and operate the requested facility for three months without revenue" would total \$ 175,000.00. Id. In response to Section III., Item 3 of the Application, Bryan certified that the only source of funds on which he was relying to meet his estimated costs was "Stan Puckett, President, Greene County Bank," who he identified as "banker" and who Bryan certified was committed to providing him the sum of \$ 175,000.00. Id. In his deposition testimony Bryan indicated that the the funds would in fact be provided by the Greene County Bank, not Mr. Pucket, individually, and that they would be made available in the form of a loan. (Depos. pp. 18)

2. In response to the Standard Document Production procedures, Bryan produced a two page document, itemizing certain "Construction Costs" and "Operating Expenses" (Depos. Exhibit No. 1) and a letter on the letterhead of the Greene County Bank, dated December 12, 1991 and signed by Stan Puckett as President.

(Depos. Exhibit No. 2) Subsequently, on September 22, 1993, Bryan produced a second letter on the letterhead of the Greene County Bank, dated September 9, 1993 and signed by Stan Puckett as President. (Depos. Exhibit No. 3)

3. Bryan's deposition testimony indicates that the two page document produced in discovery and appended to his deposition as Exhibit No. 1 represented the final written version of his itemized estimated costs for the construction and operation of the station for three months without revenue. (Depos. pp. 10) Bryan testified that he had no other documents, reflecting, supporting or relating to his cost estimates. (Depos. pp. 13, 73)

4. Bryan testified that he determined his estimated costs for construction and initial operation on the basis of his experience in broadcasting and knowledge of equipment costs and operating expenses. (Depos. p. 6) He also "went through books and information" (i.e., equipment catalogs) to arrive at his estimates. (Depos. p. 7-8) While he did obtain some equipment quotes from suppliers and manufacturers, only one, if any, was in writing, which he did not retain. (Depos. p. 10-11) Bryan claimed to have supplied most of the cost figures and believes that the itemized list of construction and operation costs (Deposition Exhibit No. 1) reflects his final estimate. (Depos. p. 10)

5. In preparing the itemization of costs Bryan designated three equipment items as "used." (Depos. Ex. No. 1) The remaining items, not specifically identified as "used," reflected the estimated cost for the purchase of "new" equipment. (Depos.

p. 12-13) While Bryan testified that he did obtain price quotes from equipment suppliers on the three "used" items, he acknowledged that none of these was obtained in writing and that he did not enter into any agreement with any supplier regarding the purchase of any "used" equipment. (Depos. p. 13)

6. Bryan acknowledged that, while his itemization of construction costs references a six bay antenna, his application reflects a proposal for a two bay antenna. (Depos. p. 14) While he did not know which he was proposing, having left that matter to his engineer, he acknowledged that he would do whatever was "best" and that his engineer had proposed the two bay antenna in the application, while the reference to a six bay antenna in the cost itemization had come from his attorney, Richard Hayes. Id.

7. With regard to operating costs, Bryan testified that the items for which he showed no expense during the first month of operation (e.g., debt service, electric service) would not be billed until the second month. (Depos. p. 14) In that regard he anticipates that no debt service would have to be paid on the bank loan until "later, after operation had begun," despite the fact that he would "probably" need to draw down portions of the loan for construction of the station prior to going on the air. Id. He acknowledged, however, that the actual terms of repayment of the loan has not been discussed with the Bank or decided. Id.

8. Bryan acknowledged that there is a \$ 38,500.00 difference between the total cost figure reflected on his itemization of construction and operating costs (Depos. Ex, No.

1) and the \$ 175,000.00 figure reported in response to Section III., Item 2 in his application. (Depos. p. 16) He testified that he had included the legal and engineering costs, which he anticipated incurring in the prosecution of his application, in arriving at the \$ 175,000.00 total and, thus, that "some" of the \$ 38,000.00 surplus was intended to be used to pay those costs. (Depos. p. 18)

9. Bryan testified that the Greene County Bank letter dated December 12, 1991 (Depos. Ex. 2) is the only documentation he obtained during the process of preparing and filing his application, relating to the proposed bank loan. (Depos. p. 19) He obtained the letter by telling the Bank's President what he was intending to do and providing him the amount he would need, i.e., \$ 175,000.00. He did not provide the Bank with any written budget for the station, a copy of his itemization of costs (Depos. Ex. 1) or anything else in writing. (Depos. p. 20, 73)

10. Bryan testified that the Greene County Bank letter dated September 9, 1993 (Depos. Ex. 3) was obtained as a result of a discussion with his attorney, where it was agreed that it would be good to confirm that the loan was still available. (Depos. p. 23-24) Bryan communicated with the Bank's President and asked him to issue another letter. (Depos. p. 23-24) The language referencing the requirement for a stock pledge was included at Bryan's request. (Depos. p. 24-25) Bryan explained that at the time of his initial discussions with the Bank, prior to the issuance of the December 12, 1991 letter, it had not been



determined whether he would be filing as a corporation or an individual. When he got the December 123, 1991 letter "it mentioned about stock and all," so in asking for a second letter in 1993 to confirm the continuing availability of the loan he also asked the Bank to include a provision "just to clarify that I was applying as an individual applicant there would not be any questions about [the requirement for a stock pledge]." (Depos. p. 25) What he told the banker in 1993 was "basically that at that point of time I was probably not going to form a corporation and, therefore, we want to clarify that if I did not it would not be set up that way." (Depos. p. 26)

11. Obstruction of Discovery. Section 1.325(c)(1) provides that in comparative broadcast licensing proceedings parties shall produce documents responsive to certain standardized categories. Included among those categories is "(x)" which requires the production of "Representative documents relating to enhancement credits and preferences sought by the applicant's principals for local residence, civic participation, past broadcast experience, minority status and the like." In his response to category (x) of the Standard Document Production Bryan produced only one document: a copy of the deed to his residence. While that document was certainly responsive as a representative document relating to his residence within the service area, Bryan failed to produce even a single representative document with regard to either his broadcast experience or any of the civic activities for which he sought credit in his Integration and Diversification

Statement.

12. By Order (93M-723), released November 23, 1993, the Presiding Judge granted an unopposed Motion to Compel, directing Bryan to produce within 10 days the documents requested pursuant to SBH's Initial Supplemental Request for Production of Documents, which had been filed on October 5, 1993. Included in SBH's Initial Supplemental Document Request were requests for the production of documents evidencing the nature and extent of Bryan's involvement in civic activities, as well as any interest, employment or other connection he had had with any radio station. (See: SBH's Initial Supplemental Request for Production of Documents, Requests Nos. 26, 29, 30, 31) However, when Bryan produced documents in response to the Presiding Judge's Order, he produced no documents relating to either his civic participation or his broadcast experience. Instead he indicated that "Representative documents concerning the nature and extent of Mr. Bryan's participation in civic and community activities have already been produced," despite the fact that only a deed to his residence had been produced in response to the Standard Document Production. Likewise, with regard to the document requests relating to interests, employment and connections with broadcast stations, Bryan responded: "No other documents are known to exist." Thus, in response to neither the Standard Document Production nor to SBH's Initial Supplemental Document Request did Bryan produce a single document relating to either his broadcast experience or any of the civic activities for which he seeks

credit.

13. When he was deposed on January 12, 1994, Bryan was questioned with regard to each civic activity and broadcast position which he had identified in his Integration and Diversification Statement to determine whether he had any documents related to or which would substantiate his involvement. Almost without exception he indicated that he did in fact have such documents. In this regard Bryan was questioned with regard to the following civic activities: Keep Greene Clean Committee, Greene County Chamber of Commerce (including membership on the Board of Directors, office of President and Chairmanship of the Recruitment Committee), Greene County Fall Fest, March of Dimes, Vocational Technical School, Greene County YMCA Board, Tusculum College Pioneer Club, Junior Achievement, the Greene County Jaycees and a local Little League Baseball Team. <sup>2</sup>/ With respect to each of these activities he testified at his deposition that he did in fact have documents demonstrating or substantiating his participation. (Depos. pp. 38-50)

Furthermore, Bryan confirmed that his responses to SBH's Intitial

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2. With regard to his position as Vice President of Public Affairs for the Chamber of Commerce, he was uncertain whether he had any documents, although he did keep a scrapbook regarding his civic activities and he acknowledged that the Chamber's annual program included a listing of officers and certificates were normally awarded to persons holding that position. (Depos. 40-41) Likewise, he was uncertain whether he had documents relating to his participation on Finance Committee and Long Range Planning Committee of First Baptist Church, but was certain that the Church would have documents reflecting his involvement. (Depos. 48) Thus, there may exist documents relating to those activities which have not been produced.

Supplemental Request, reflected in his counsel's December 6, 1993, letter were true and correct and that he had been provided with a copy of each of SBH's document requests and had been specifically requested by his counsel to search his files and provide copies of any responsive documents. (Depos. 71) Yet, he failed to produce even a single document in response to either the Standard Document Production or SBH's Initial Supplemental Request for Production of Documents relating to any of his claimed civic participation.

14. Bryan was also questioned with regard to the broadcast positions he had held at WEZK, WSBM, WAZI and WSMG(AM), Greeneville, Tennessee. With respect to each of these positions, except that with WEZK, Bryan testified at his deposition that he does in fact have documents demonstrating or substantiating his participation. (Depos. 50-51) Yet, he failed to produce even a single document in response to either the Standard Document Production or SBH's Initial Supplemental Request for Production of Documents relating to his broadcast experience.

#### DISCUSSION

15. Financial Qualifications. The June, 1989 Edition of FCC Form 301, which Bryan utilized, requires the applicant to certify at Section III. as to the total amount of estimated costs it will be required to meet in the construction and operation of the proposed station, as well as the availability of committed sources of funding to meet its estimated costs, which sources the

applicant is required to specifically identify. In addition the applicant is required to have on hand at the time of filing certain specified documentation to support such a certification. The instructions to Section III of the June, 1989 Edition of FCC Form 301 provide at Item D(3)(d) that applicants relying on commitments from financial institutions are required to have the following documentation on hand before they can properly certify as to their financial qualifications:

The document by which the institution...has agreed to provide the loan or credit, showing the amount of loan or credit, the terms of payment or repayment of the loan, collateral or security required, rate of interest to be charged, and special requirements (e.g. moratorium on principal or interest, waiver of collateral, etc.)

The explicit specification repayment terms, collateral and guarantee requirements and any other conditions is necessary to permit the applicant to ascertain whether it can meet such requirements and conditions. In this regard the Instructions to Section III of FCC Form 301 (June, 1989 ed.) specifically provide (at Item B) that in certifying its financial qualifications, wthe applicant is also attesting that it can and will meet all contractual requirements, if any, relating to collateral, guarantees, donations and capital investment."

16. As indicated above, three of the equipment items listed on Bryan's itemization of construction and operation costs (Depos. Ex. 1) were designated as "used" and Bryan confirmed that the costs listed for those items were based on costs for used equipment. However, Bryan also confirmed that he had not

obtained any price quotes for used equipment in writing and had no agreement with any supplier to provide any used equipment at the prices specified in his itemization. Where an applicant proposes to rely on used equipment, it must either demonstrate that it has such equipment on hand or or that the equipment it proposes to purchase is readily available at a specified price:

An applicant is required to show that the essential items of equipment are either possessed or reasonably available at a cost which would not impair its financial qualifications. Although [the applicant] may have intended to obtain comparable used equipment, it is not sufficient simply to allege that comparable equipment is available.

United Broadcasting Co., 93 FCC 2d 482, 508 (1983) (reliance upon used equipment, without an adequate showing that such equipment continued to be available, rendered estimates "unrealistically low." at 509). Thus, simply "alleging" that particular items equipment are available used at market prices is insufficient to meet the applicant's obligation to reasonably ascertain construction costs. Wayne County Broadcasting Corp., 26 FCC2d 52, 55-56 (1970)(issue added to determine whether costs estimates were reasonable, where applicant claimed that equipment cost estimates were based on the prices of "good used equipment on the market," but possessed no evidence that such equipment was actually available at the specified costs). See also: Dearborn County Broadcasters, 15 FCC2d 247, 248-49 (1968) and Chapman Radio and Television Co., 7 FCC2d 557, 558-59 (1967), where financial issues were added in part due to failure to demonstrate availability of used equipment. Therefore, inasmuch as Bryan

proposed to rely on his ability to purchase used equipment, he was required to demonstrate both that the specific items of used equipment he proposes are readily available and that they will in fact be available for purchase by him at the price he has budgeted. Given his acknowledged lack of any written price quotations and the absence of any agreement with any supplier to sell him the required equipment at a specific price, Bryan was not in a position to rely upon used equipment at the time he certified his financial qualifications and, accordingly, there exists a material question of fact whether he underestimated his costs for the three items he identified as "used."

17. As reflected in the attached Declaration of William Seaver and in the accompanying equipment price quotations supplied by Continental Electronics Corporation (Exhibit B, hereto), which are hereby incorporated herein by reference, a significant number of the itemized equipment costs reflected on Bryan's itemization of construction and operation costs (Depos. Ex. 1) are seriously understated. Indeed, as Seaver's Declaration demonstrates, Bryan has underestimated his costs of construction by at least \$ 52,422.00, considering only those items of equipment which he has actually proposed. If the cost of additional equipment, which is needed for the normal and proper operation of the station, but not included in Bryan's itemized estimate (Depos. Ex. 1), is added, Bryan has underestimated his construction costs by at least \$ 57,596.00. This figure does not even take into account the cost of

purchasing new those equipment items which Bryan has proposed to purchase "used."

18. Given Bryan's failure to reliably determine his estimated costs of construction, financial issues are warranted, both as to his current financial qualifications, as well as his financial qualifications at the time he certified those qualifications. William S. Daugherty, III., 4 FCC Rcd. 2605 (RB 1989) (failure of applicant to reasonably ascertain costs of construction and initial operation precludes applicant from determining the amount of funds necessary to construct and operate); United Broadcasting Co., 93 FCC 2d 482, 507-9 (1983)(omission of a number of cost items and reliance upon used equipment); Erwin O'Connor Broadcasting Co., 51 FCC 2d 1114, 1115-24 (1975)(omission of a number of important items from cost estimates); Dearborn County Broadcasters, 15 FCC2d 247, 248-50 (1968)(financial issue added due to uncertainty in adequacy of estimated constuction and initial operating costs); Chapman Radio and Television Co., 7 FCC2d 557, 559-60 (1967)(uncertainty as to adequacy of estimated constuction and initial operating costs)

19. Bryan acknowledged in his deposition testimony that with regard to certain items of anticipated operational expense, listed on his itemization of construction and operation costs (Depos. Ex. 1), no costs were listed for the first month, based on his assumption that they would not be billed until the end of the first month. However, Bryan acknowledged that it would be necessary to draw down the proceeds of the bank loan prior to



commencement of operations in order to construct the station. While he believes that no debt service will have to be paid prior to the second month of operation, the December 12, 1991 letter from the Greene County Bank (Depos. Ex. 2) upon which he relied in certifying his financial qualifications provides no basis, whatsoever, for Bryan's belief and he acknowledged that terms of repayment had neither been discussed with the Bank nor determined, as of the time of his deposition. Likewise, the station will also incur costs for electric service during the construction phase, as well as once operations commence, undermining Bryan's contention that these costs would not be billed until the second month of operation. Accordingly, there exists a material question of fact regarding whether Bryan has underestimated his operating costs are reliable in light of his omission of debt service and electric service from his first months operating costs, without supporting documentation. Chapman Radio and Television Co., 7 FCC2d 557, 559 (1967)(financial issue added in part due to failure to include debt service in cost estimate).

20. Although Bryan's total cost estimate of \$ 175,000.00 exceeds by approximately \$ 38,500.00 the total of his itemized cost figures (as reflected in Depos. Ex. 1), there is basis for concluding that Bryan would be able to rely upon any portion of this surplus to meet equipment and operating costs, inasmuch as Bryan acknowledged that he had included the legal and engineering costs of prosecuting his application in his \$ 175,000.00 cost

estimate and that at least of a portion of the "surplus" would be required for this purpose. Thus, given the uncertainty as to the amount of legal and engineering costs Bryan will incur, it may not be assumed that any portion of the \$ 38,500.00 surplus will be available to cover any shortfall in either his equipment or operating estimates.

21. Given the foregoing deficiencies in Bryan's proposal, appropriate financial and financial certification issues must be added in light of his failure to adequately and realistically estimate his costs of constructing and operating the proposed station for three months without revenue. Initially, Bryan improperly relied upon "used" equipment costs for some items, without any supporting documentation reflecting that such equipment is available for his purchase at the prices indicated. Secondly, he has seriously underestimated his construction costs. When the actual cost of purchasing those items of equipment he has underestimated is added to his other estimated construction and operating costs, it must be concluded that Bryan's proposal will cost between \$ 189,104.88 and \$ 194,279.23 to implement. <sup>3</sup>/

These figures do not even include the cost of purchasing new the equipment he proposed to purchase "used" or the debt service and electric service costs he has omitted from his estimate, nor do

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3. Figures determined as follows: \$ 49,560.00 + 101,551.00 (equipment) + \$ 37,993.88 (operating costs) = \$ 189,104.88 (assuming equipment actually proposed) or \$ 49,560.00 + \$ 106,725.35 (equipment) + \$ 37,993.88 (operating costs) = \$ 194,279.23 (assuming equipment actually needed). See: attached Declaration of William Seaver and supporting documentation.

they include the legal and engineering costs which he anticipated incurring in the prosecution of his application, which costs he included in his total estimate of \$ 175,000.00. Accordingly, a material question of fact exists whether Bryan underestimated his costs and whether Bryan has sufficient funds available to meet his actual costs of constructing and operating the proposed station.

22. Considering the terms and conditions reflected in the December 12, 1991 letter from the Greene County Bank upon which Bryan relied in certifying his financial qualifications, it is apparent that the letter is deficient inasmuch as it fails to provide the type of information specifically required by the Commission. In this regard, while the letter purports to set forth collateral requirements and indicates certain specific collateral that will be required (i.e., "a lien on all acquired assets"), the letter also indicates that the Bank will require additional collateral in the form of a pledge of "all stock," without specifying the identity of such stock. In the absence of any indication of precisely what collateral the Bank would require in this regard, Bryan was not in a position to know whether or not he would be able to meet the Bank's collateral requirements for the loan. Indeed, the fact that the Bank indicated that it would require stock to be pledged seriously undermines any possibility that Bryan was in a position to meet the Bank's collateral requirements at the time he so certified, inasmuch as he knew by that time that he was filing as an

individual applicant, not a corporation. Bryan acknowledged in his deposition testimony that he did not discuss with the Bank the requirement for the pledge of "all stock" until 1993, when he approached the Bank to obtain a letter indicating that funding was still available and clarifying whether or not a pledge of stock would be required. (Depos. pp. 24-26) Thus, at the time he certified his financial qualifications and filed his application he had no basis for knowing whether or not he could "meet all contractual requirements, if any, relating to collateral, guarantees, donations and capital investment," as required.

23. As indicated above, while Bryan testified that he anticipates that no debt service would have to be paid on the bank loan until "later, after operation had begun," he acknowledged that he would "probably" need to draw down portions of the loan for construction of the station prior to going on the air. (Depos. p. 14) However, neither of the letters from the Greene County Bank (Depos. Exhibits Nos. 2 & 3) specify any repayment terms. Indeed, Bryan acknowledged that the actual terms of repayment of the loan has not yet been discussed with the Bank, much less determined. (Depos. p. 14) The instructions to Section III of the June, 1989 Edition of FCC Form 301, which Bryan utilized, provide at Item D(3)(d) that applicants relying on commitments from financial institutions are required to have on hand before certifying their financial qualifications documentation, reflecting "the terms of payment or repayment of the loan." Bryan failed to comply with this requirement. In fact

he has acknowledged that the terms of repayment of the loan have not even been discussed with the Bank, much less decided.

24. Therefore, under such circumstances it must be concluded that a prima facie showing has been made that Bryan had no legitimate basis for certifying as to the availability of a commitment of funding from the Greene County Bank when he so certified at the time his application was filed or in continuing in such representation. The instructions to Form 301 are clear and unambiguous. In certifying as to the availability of committed funds, an applicant is also certifying that it has in its possession the documentation of that commitment, which the Commission requires. Thus, an applicant cannot properly certify as to the availability of financing from a financial institution in the absence of documentation containing the elements explicitly required by Section III, Item D(3)(d) of the Instructions to FCC Form 301, set forth with sufficient clarity to permit the applicant to properly attest that it can and will meet the terms and conditions to which the proposed loan is to be made subject.

25. Even were the pre-June, 1989 standard applicable here, precedent established under that earlier standard would require enlargement of the issues here. Thus, in Pontchartrain Broadcasting Co., Inc., 4 FCC Rcd. 5245, 5246 (RB 1989) the Board emphasized the requirement that "bank commitment letters must be prepared and must be sufficiently specific and complete to furnish reasonable assurance of the availability of the loan." citing Las Americas Communications, Inc., 1 FCC Rcd. 786, 788 (RB

1986)). Thereafter, in Scioto Broadcasters, 5 FCC Rcd. 5158, 5160 (RB 1990), aff'd. 6 FCC Rcd. 1988 (1991) the Board held that in order to permit a finding of reasonable assurance of financing three essential elements were necessary:

central to any successful "reasonable assurance" showing of a loan from a financial institution is that the individual qualifications of the borrower have been preliminarily reviewed,...that adequate collateral has been demonstrated...and that the tentative terms of the loan are specifically indentified and are satisfactory to both borrower and lender.

Here of course the December 12, 1991 letter upon which Bryan relied was neither sufficiently specific nor complete, precluding any determination as to whether they were "satisfactory" to the proposed borrower, Mr. Bryan, much less to provide any basis for any determination as to whether he would be in a position to meet those conditions.

26. In summary a prima facie showing has been advanced that at the time he filed his application and certified as to the availability committed funds from the Greene County Bank Bryan the documentation which Bryan had on hand to support that certification was insufficient to meet the explicit requirements which the Commission has imposed, and was, likewise, insufficient to afford Bryan with any basis for determining whether he would be in a position to meet the terms and conditions to which the proposed financing was to be made subject. Lacking the documentation required by the Commission, Bryan's financial certification was unsupported and, accordingly, false. Therefore, both the requested financial qualifications issues, as well as

the false certification issue, are warranted and should be added. The burdens of proceeding and proof should be placed on Bryan.

27. Obstruction of Discovery. While the Commission has always recognized the importance of discovery procedures for the production of documents, in an effort to expedite the hearing process, the Commission's Rules were amended to impose specific obligations on applicants in comparative proceedings regarding the production of documents, through the Standard Document Production procedures. As established above, Bryan failed to comply with these procedures. Furthermore, when faced with SBH's Initial Supplemental Request for Production of Documents, Bryan, again, ignored the requirements of the Commission's Rules, failing to timely produce or object to the production of the documents requested by SBH. Subsequently and only after prodding from SBH's counsel, Bryan belatedly responded with an "objection," which relied solely upon the claim that "some" document requests overlapped the Standard Document Production, with which it is now readily apparent that Bryan had failed to comply. When faced with a Motion to Compel production, Bryan failed to offer any justification for his noncompliance and simply submitted no response, demonstrating that he had no justification and was simply engaging in delaying tactics. Thereafter, when the Presiding Judge issued his Order (93M-723), directing Bryan to produce the documents requested by SBH, Bryan failed to do so, claiming that no documents existed, other than those previously produced, which, with respect to the qualitative

categories of residence, civic activities and broadcast experience, had included only a copy of the deed to his house. However, in his deposition Bryan acknowledged under oath that documents do in fact exist, relating to almost every civic activity for which he has claimed credit and each broadcast position he has held. Taken together, these facts reflect a flagrant obstruction of discovery and an abuse of the Commission's procedures in furtherance of such obstruction. An appropriate issue must be added.

#### DISCOVERY

28. In the event the issues are enlarged as requested, SBH would request to take the depositions of Darrell Bryan, Stan Puckett and any other person who may have knowlege concerning matters relevant to the added issues. In addition SBH requests the production of documents responsive to the attached requests.

WHEREFORE, premises considered and good cause having been shown, the issues in this proceeding should be ENLARGED to include the above requested issues.

Respectfully Submitted

SBH PROPERTIES, INC.

By: 

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February 15, 1994



## DOCUMENTS REQUESTED

1. In documents upon which Bryan prepared, reviewed or relied upon in preparing his estimated costs of constructing and operating the proposed station for three months without revenue, in preparing his itemized estimate of such costs (Depos. Ex. 1) or in arriving at his total cost estimate of \$ 175,000.00, as listed in his application.

2. Any documents reflecting any communications or discussions between Bryan and any other person relating to the preparation of his estimated costs of constructing and operating the proposed station for three months without revenue, the preparation of his itemized estimate of such costs (Depos. Ex. 1) or the determination of his total cost estimate of \$ 175,000.00, as listed in his application.

3. Any documents which Bryan prepared, reviewed or relied upon in certifying the availability of a proposed loan from the Greene County Bank, as a source of funds to meet his estimated costs.

4. Any documents which the Greene County Bank prepared, reviewed or relied upon in issuing its December 12, 1991 and September 9, 1993 letters to Bryan (Depos. Ex. 2 & 3)

5. Any documents which Bryan has relating to his civic activities or broadcast experience, including but not limited to those documents referred to by Bryan at his January 12, 1992 deposition.